IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10079 of 1994

For Approval and Signature:

HON'BLE MR.JUSTICE M.R.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HARMANBHAI B BIN

Versus

AMBUBHAI P PATEL THROUGH HIS P/A CHANDRAVADAN A PATEL

Appearance:

1. Special Civil Application No. 10079 of 1994

MR GIRISH D BHATT for Petitioner.

MR AJ PATEL for Respondent No. 1-1/5

CORAM : HON'BLE MR.JUSTICE M.R.SHAH

Date of decision: 21/04/2004

ORAL JUDGEMENT

The petitioner, who claims to be tenant of the disputed land bearing Survey No. 64 admeasuring 3 acres and 33 gunthas situate in the Sim of village Ode under Section 32-G and 32-O of the Bombay Tenancy and Agricultural Lands Act (hereinafter referred to as 'the Act') had preferred the present Special Civil Application

under Article 227 of the Constitution of India challenging the judgment and order passed by the Mamlatdar and ALT dated 25.5.1990 in Tenancy Case No. 25 of 1989 confirmed by the Deputy Collector and the Gujarat Revenue Tribunal by which all the authorities have concurrently held and found that the petitioner was in possession of the land in question as a mortgagee and he cannot be declared as tenant under the provisions of the Act.

2. Few facts are necessary for the purpose of determination of the present Special Civil Application which are as under.

That one Purshottam Jibhai and Punjabhai Ambaidas were the owners of the land bearing Survey No. 64 admeasuring 3 acres and 33 gunthas of land situate in the Sim of village Ode. They had mortgaged the suit survey number to one Bhikhabhai Ashabhai, i.e., father of the petitioner herein by registered Mortgage Deed dated 28.6.1949 for an amount of Rs. 5000. That it seems that prior thereto the very land was mortgaged on 25.4.1919 and thereafter on 30th December 1928 to the forefathers of the petitioner. It is the case of petitioner that they continued to be in possession of the land in question throughout and the mortgage deed was not relinquished and redeemed and the possession was never handed over to the original land owner. That the petitioner herein made an application to the Mamlatdar and ALT, Anand, for declaring him as a tenant under Section 32-G and 32-O of the Act by contending inter alia that he and his forefathers were cultivating the land in question on the appointed date and they were the tenants of the land in question. The said application was resisted by the respondents herein and it was denied that he is the tenant of the land in question. It was submitted on behalf of the respondents that the suit survey number originally belonged to his father Purshottambhai and uncle Punjabhai, that they had mortgaged the survey number with Bhikhabhai Ashabhai, father of the petitioner on 27.6.1949 for an amount of Rs.5000 under registered mortgage deed dated 28.6.1949 for a period of 10 years and thus it was contended that the applicant is in possession of the suit Survey number as a mortgagee in possession. It was further denied that the father of the applicant was ever the tenant of the suit survey number. It was submitted that as the applicant was in possession of the suit survey as a mortgagee in possession he cannot become the tenant of the suit survey number under Section 4 of the Act. That the Mamlatdar and ALT, after recording the evidence and

the statements and considering the documentary evidence on record came to the conclusion and held that the petitioner was the mortgagee in possession of the suit survey number and accordingly rejected the application submitted by the petitioner for declaring him as a tenant under the Act.

3. That being aggrieved and dissatisfied with the judgment and order passed by the Mamlatdar and ALT dated 25.5.1990 rejecting the application of the petitioner for declaring him as a tenant he filed tenancy appeal before the Deputy Collector (Land Reforms) Appeals, Kheda, which was numbered as Tenancy Appeal No. 292/1990. The Dy. Collector (Land Reforms), Appeals, Kheda by order dated 29.6.1991 dismissed the said appeal confirming the order passed by the Mamlatdar & ALR, Anand, dated 25.5.1990.

4. Being aggrieved and dissatisfied with the order passed by the Dy. Collector (Land Reforms) Appeals, Kheda, dated 29.6.1991 in Tenancy Appeal No. 292/1990 dismissing the same and confirming the order passed by the Mamlatdar & ALT dated 25.5.1990 by which the application of the petitioner for declaring him as tenant came to be rejected, the petitioner preferred revision application before the Gujarat Revenue Tribunal which was numbered as Revision Application No. TEN.BA 715/1991. It was contended on behalf of the petitioner before the Tribunal that the Mamlatdar & ALT has not issued general notice under Section 32-G of the Act nor he has issued notice to the interested parties and thus the inquiry made by him is not legal and valid. It was further contended on behalf of the petitioner that both the authorities have erred in coming to the conclusion that the petitioner was mortgagee in possession of the land in question and therefore requested to quash and set aside the orders passed by both the authorities below. The Revenue Tribunal by order dated 13th April 1992 dismissed the said revision application confirming the order passed by both the authorities below by holding that the applicant is in possession of the suit survey number as a mortgagee in possession and that he has not produced any documentary evidence to prove that he is the tenant of the suit survey number and thus he cannot become the deemed tenant under Sec. 4 of the Act.

5. It seems that on the basis and to take the benefit of the Judgement of the Hon'ble Supreme Court of India in the case of A.A. Shirdone Vs. Saheb H. Tajbhokari, reported in AIR 1985 S.C. 836, the petitioner for the first time came out with a case that earlier the mortgage in respect of the suit land in

question was created on 19th March 1919 and thus the mortgage was prior to 1948, and that after the amendment came into force no application was filed within one year by the landlord-mortgagor and therefore the landlord has lost his right to get the possession and therefore the petitioner preferred review application before the Revenue Tribunal which was numbered as Review Application No. TEN.CA 44/1993. It was contended on behalf of the petitioner that as he was the mortgagee in possession of 1919 and 1928 and the amending act of 1946 has come subsequently by which the mortgagee in possession cannot be declared to be a deemed tenant, and in the Act of 1939 there was no such provision and therefore it was contended on behalf of the petitioner that both the authorities below have erred in not declaring him as a tenant. That the Tribunal by order dated 14.9.1993 dismissed the said review application by holding that it was not the case of the applicant before the Mamlatdar and ALT or the Dy. Collector or before the Tribunal and therefore the applicant cannot be allowed to bring a new case in the review application, and thus dismissed the said review application.

6. Being aggrieved and dissatisfied with the judgment and order passed by the Tribunal dated 13th April 1992 in Revision Application No.TEN.BA 715/1991, the order passed by the Tribunal dated 14th September 1993 passed in Review Application No. TEN.CA 44/1993 and also the order passed by the Dy. Collector (Land Reforms), Appeal, Kheda dated 29th June 1991 and the order passed by the Mamlatdar & ALR dated 25th May 1990 in not declaring him as a deemed tenant the petitioner has preferred the present Special Civil Application under Article 227 of the Constitution of India.

7. Shri G.D. Bhatt, learned advocate appearing on behalf of the petitioner had submitted that all the authorities below have erred in not declaring the petitioner as a tenant with regard to the land in question on the ground that the petitioner was mortgagee in possession. He has submitted that the petitioner was in possession of the suit land since 1919 and continued to be in possession of the land in question in the year 1928 and also at the time when the last mortgage deed came to be executed in 1949. Thus, he has contended that as the petitioner was the mortgagee in possession prior to 1946 and therefore he was required to be declared as tenant as per provisions of the Act. It is further contended on behalf of the petitioner that in view of the judgment of the Hon'ble Supreme Court in the case of A.A. Shirdone (Supra) as the landlord, i.e. the mortgagor did

not file an application for declaration before the Mamlatdar & ALT that the mortgagees were not the tenants, within one year of the coming into force of the amending Act of 1946 as provided in Section 2A and 3A of the Act of 1939, he has lost whatever right he had and therefore the petitioner was required to be declared as a tenant with regard to suit land. Shri Bhatt has also submitted that the Gujarat Revenue Tribunal has materially erred in not allowing the petitioner to raise the question with regard to the applicability of the amending Act of 1946 and the question which the petitioner has raised in the review application. He has submitted that as it was purely a question of law and applicability of the statutory provisions, the Tribunal ought to have considered the case of the petitioner on merits which he has canvassed in the review application. On all these points, he requested to quash and set aside the order passed by all the authorities by which the application of the petitioner to declare him as a tenant is rejected by holding that he is mortgagee in possession of the land in question.

8. On the other hand, Shri AJ Patel, the learned advocate appearing on behalf of the respondents has supported the order passed by all the authorities below. He has submitted that all the authorities have concurrently found and held that the petitioner was mortgagee in possession and that he has failed to produce any documentary evidence to prove that prior to the mortgage he was or his father was in possession of the land as a tenant or they were cultivating the land in question and therefore he has submitted that this Court exercising the power under Article 227 of the Constitution of India should not set aside the finding of fact given by all the authorities below. Mr. Patel has also further submitted that so far as the contention on behalf of the petitioner with regard to applicability of the amended Act of 1946 and that the petitioner is in possession of the land since 1919 is concerned, as such there was a fresh mortgage deed on 27.6.1949 which was registered on 28.6.1949 for an amount of Rs. 5000 and that in the year 1949 i.e., on 27.6.1949 the petitioner was put into possession again and he has also submitted that as such prior to 1949 and between 1928 the landlord, i.e. mortgagor was put in possession by the petitioner and for that purpose he has relied upon the documentary evidence such as Village Form No. 7/12 for the period between 1941-42 and 1949-50. On the basis of the village form No. 7/12, Shri AJ Patel has suggested that respondents were put in possession in the year 1941-42 and they continued to be in possession till the mortgagee

dated 27.6.1949 came to be executed and when the amended Act came into force, as per Section 4 of the amended Act the mortgagee in possession cannot be declared to be the tenant and therefore when the petitioner was put into possession of the land in question there was a clear cut provision and therefore he could not be declared to be a tenant as per Section 4 of the amended Act. Shri Patel has also submitted that when the mortgagee was already put in possession on the day on which the amended Act came into force there was no question of making an application by the mortgagee to get the possession on the basis of the judgment of the Hon'ble Supreme Court in the case of A.A. Shirdone (Supra) Shri Patel has relied upon the affidavit-in-reply filed on behalf of the respondents in which it is stated that the possession of the land in dispute was handed over to the deceased father of the petitioner on the date of execution of the mortgage deed on 27.6.1949. He has also further submitted in the affidavit-in-reply that the earlier mortgage of the year 1928 was already obliterated and the relationship of mortgagee and mortgagor had come to an end some time in 1940-41. He has further submitted that Pani Patrak of the year 1941 proves beyond doubt the said fact and that the relationship of mortgagor and mortgagee came to an end in 1941-42 in the event of handing over possession of the land in dispute to the predecessor-in-title of the respondent. He has also further submitted in the affidavit-in-reply that the document of the year 1949 was an independent document of mortgage and it could not have been tagged with the earlier mortgages which were already redeemed on the date the physical possession of the land in dispute was handed over. He has also stated on the basis of the recitals of the mortgage deed of 1949 that the possession of the land in question was handed over to the father of the petitioner on 27.6.1949 and therefore he has requested that when he was put in possession as a mortgagee in the year 1949 all the authorities below have rightly come to the conclusion that as he is a mortgagee in possession he cannot be declared to be the tenant of the land in question.

9. Shri GD Bhatt, learned advocate appearing on behalf of the petitioner has relied upon affidavit-in-rejoinder filed on behalf of the petitioner. Shri Bhatt has submitted while reiterating what is stated in the affidavit-in-rejoinder that the petitioner predecessor-in-title was in actual physical possession of the land in question at the time of execution of the first registered Mortgage Deed dated 19th March 1919 and till date they continued to be in possession of the land in question. It is emphasized by Shri Bhatt that the

possession of the land in question was never handed over to the landlord as alleged on behalf of the respondents and therefore when the petitioner's father and thereafter the petitioner were in possession of the land in question on the basis of the mortgage deed of 1919 the amending Act of 1939 and 1948 would not be applicable and as no application was given by the landlord within a period of one year they have lost whatever rights available to them and therefore requested to allow the present Special Civil Application by quashing and setting aside the orders passed by the concerned authority.

10. I have heard the learned advocates appearing for the parties. I have also gone through the orders passed by the Mamlatdar and ALT, the Deputy Collector, Anand and the Gujarat Revenue Tribunal. I have also gone through all the documentary evidence which are available and produced on record of the case. From the mortgage deed of 1949, i.e. 27.6.1949, it is crystal clear that the possession of the land in question was handed over to the petitioner in the year 1949. Therefore, they came to be in possession as mortgagee in possession in the year 1949. From the Village Form No. 7/12 which is produced on record, it is clear that for the period between 1941-1942 and 1949-50 the name of the landlord is mentioned as occupier of the land in question. Thus, from the aforesaid document, it is clear that after the 2nd mortgage deed of the year 1928 the possession of the land in question was handed over to the mortgagor some where in the year 1941-42. The aforesaid documents suggest that the landlord was put into possession in the year 1941-42 and he continued to be possession upto 1949, on 27.6.1949 i.e., the date on which the fresh mortgage deed came to be executed. Thus, when the petitioner and/or his predecessor-in-title, his father and uncle came to be in possession in the year 1949 on the basis of the aforesaid mortgage they became mortgagee in possession in the year 1949 and in that view of the matter when they were mortgagee in possession in 1949 considering the provisions of Section 4 of the Act of 1948, a person who is a mortgagee in possession cannot be declared to be a deemed tenant and therefore all the authorities below have rightly come to the conclusion and held that the petitioner who was mortgagee in possession cannot be declared to be a tenant with regard to the land in question.

11. So far as the argument on behalf of the petitioners that they were in possession on the basis of the mortgage deed dated 25.4.1919 and they continued to be in possession till the date on which the mortgage deed

of 1949 came to be executed and therefore when they were mortgagee in possession prior to 1946 and within one year of amending Act of 1946 an application was not made by the landlord for getting the possession, the landlord has lost his whatever right available to them and therefore when they were mortgagee in possession prior to 1946, the amending Act of 1948 by which the mortgagee in possession cannot be declared to be the tenant will not be applicable to the applicant is concerned, first of all the same was not argued by the petitioner before any authority such as Mamlatdar & ALT, Deputy Collector, and also before the Gujarat Revenue Tribunal. For the first time in a Review Application before the Gujarat Revenue Tribunal, the contention was raised with regard to applicability of the amending Act of 1946 and the argument also that they were there as mortgagee in possession on the basis of the mortgage deed of 1919 and they continued to be in possession of the land in question till the mortgage deed 27.6.1949 came to be executed. The factum of possession continued to be with the possession is categorically denied by the respondents. It is the case of the respondents that after the mortgage deed of 1928 the possession of the land in question was handed over to the landlord in the year 1941-42 and thereafter the possession was again handed over to the petitioner in the year 1949. This is a pure question of fact and in view of the aforesaid denial on the part of the respondents the same becomes a disputed question of fact. Whether the petitioner continued to be in possession even when the mortgage deed of 1949 was executed or not and whether in the year 1941-42 the possession of the land in question was handed over to the landlord which again came to be handed over to the petitioner in the year 1949 are all disputed questions of fact.

This Court, in a petition under Article 227 of the Constitution of India, will not be in a position to decide the disputed question of fact, more particularly when the aforesaid point has not been raised and argued by the petitioner before any of the authorities namely Mamlatdar & ALT, Deputy Collector and Gujarat Revenue Tribunal. Therefore, it is not open for the petitioner to raise the aforesaid contention which raises the disputed question of facts with regard to handing over of the possession. Even otherwise, as stated hereinabove, on the documentary evidence placed on record, such as the mortgage deed of 1949 and Village Form No. 7/12, it seems that the possession of the land in question was again handed over to the petitioner in 1949 and that earlier the possession of the land in question was handed

over to the landlord in the year 1941-42 and the landlord continued to be in possession upto 1949 till the possession was again handed over to the petitioner on the basis of the mortgage deed of 1949. Therefore, when the petitioner became mortgagee in possession in the year 1949, as stated hereinabove, in view of the provisions of the amending Act, i.e. Section 4 of the Amending Act, a person who is mortgagee in possession cannot be declared to be a deemed tenant.

12. Under the circumstances, and in view of the aforesaid finding, it cannot be said that all the authorities below have erred in holding that the petitioner is not required to be declared as a deemed tenant with regard to the land in question and that the petitioner has failed to prove that prior to 1919 the petitioner's forefathers and/or the petitioner were in possession of the land in question. In view of the aforesaid facts and findings, the present Special Civil Application is required to be dismissed and is hereby dismissed. Rule is discharged with no order as to costs.

At this stage, Shri Bhatt, ld. advocate appearing for the petitioner requests to stay the operation and implementation of this order to enable his client to take appropriate steps before the higher forum. In view of the fact no interim relief was granted by this Court during the pendency of the Special Civil Application, there is no question of granting any stay against operation and implementation of this order and hence the prayer is rejected.

rmr. [M.R. Shah, J.]